STATE OF MICHIGAN

COURT OF APPEALS

RICKIE J. WRIGHT, Plaintiff-Appellant,	FOR PUBLICATION July 10, 2008
v	No. 275518 Oakland Circuit Court
AMY RINALDO and KOHN & ASSOCIATES, P.L.L.C., Defendants-Appellees.	LC No. 2006-072522-NM Advance Sheets Version

Before: Saad, C.J., and Borrello and Gleicher, JJ.

GLEICHER, J. (*dissenting*).

I respectfully dissent. Under the text of MCL 600.5838(1), plaintiff's legal-malpractice claim accrued when defendant Amy Rinaldo discontinued serving him in a professional capacity "as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." Rinaldo discontinued serving plaintiff in October 2005, when Rinaldo first learned that plaintiff had revoked her power of attorney to act as his patent counsel. Contrary to the majority's analysis, plaintiff's earlier knowledge of the existence of a claim is neither controlling nor relevant, according to the unambiguous language of the accrual statute. Therefore, plaintiff timely filed this lawsuit on February 16, 2006.

The majority concludes that the cause of action accrued on December 18, 2003, because plaintiff signed documents on that date revoking Rinaldo's power of attorney and referring to her as his "former" counsel. According to the majority, when plaintiff signed these documents, he "in essence ended the relationship, albeit without formally informing Rinaldo." *Ante* at ___. The majority acknowledges that plaintiff "strategic[ally] conceal[ed]" his intent to discharge Rinaldo and that Rinaldo had no knowledge of plaintiff's intent to discharge her until October 2005. *Ante* at ___.

The "matter[] out of which the claim for malpractice arose" was a defective patent application. The factual record, in conjunction with the rules governing patent-law practice, establishes that Rinaldo bore the responsibility to represent plaintiff until his new counsel successfully filed a revocation of her power of attorney and Rinaldo learned of that filing. In MCL 600.5838(1), the Legislature described a purely objective standard for accrual that triggers the running of the two-year period of limitations by a discernible event: the discontinuation of services. An attorney does not discontinue serving a client merely by making a subjective

mental decision to quit. In my view, communication with the client is an essential element of an attorney's decision to discontinue representation. Further, I believe that an unhappy client may elect to continue an attorney's representation despite dissatisfaction with the attorney's performance or an expressed intent to discharge the attorney in the future. If the client elects to maintain the attorney-client relationship, the attorney remains responsible for the dissatisfied client's representation until he or she (1) is relieved of that obligation by the court, (2) is officially fired by the client, or (3) gives the client reasonable notice that representation has been terminated. See MRPC 1.16.

I. The Factual Record

In September 1999, plaintiff, Rickie Wright, and his business partner, Wade Waterman, filed an initial patent application for a "Surface Protection System Mat." Plaintiff had drafted the patent application without the assistance of counsel. In June 2000, the United States Patent and Trademark Office (USPTO) rejected the patent application for several reasons, including plaintiff's failure "to define the invention" in the requisite manner and the application's recitation of the claims "in narrative form . . . replete with indefinite and functional or operational language." Plaintiff then retained Rinaldo, a registered patent specialist,[1] to file an amendment of the defective 1999 patent application. Rinaldo commenced her efforts on plaintiff's behalf by filing with the USPTO a power of attorney signed by plaintiff.

The rules of practice before the USPTO are similar to the Michigan Court Rules in several important respects. Under the Michigan Court Rules, an attorney "may appear by an act indicating that the attorney represents a party in the action." MCR 2.117(B)(1). "Act" includes filing "a written appearance . . . ." MCR 2.117(B)(2)(a). The rules governing practice in the USPTO provide that "[a]n applicant for patent may file and prosecute his or her own case, or he or she may give a power of attorney so as to be represented by one or more patent practitioners or joint inventors." 37 CFR 1.31. The power of attorney in a patent case serves exactly the same function as an appearance:

> When a patent practitioner acting in a representative capacity appears in person or signs a paper in practice before the United States Patent and Trademark Office in a patent case, his or her personal appearance or signature shall constitute a representation to the United States Patent and Trademark Office that under the provisions of this subchapter and the law, he or she is authorized to represent the particular party on whose behalf he or she acts. [37 CFR 1.34.]

On August 29, 2000, Rinaldo filed with the USPTO an amendment of plaintiff's patent. While the amended patent application was pending in the USPTO, a business owned by plaintiff

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[1] Rinaldo testified at her deposition that a registered patent attorney "can prosecute applications before the United States Patent and Trademark Office," which encompasses filing applications, preparing amendments, discussing applications with examiners, and "if need be, do[ing] interference proceedings, appeals before the Board . . . ."

and Waterman (Golden Eagle) marketed and sold the surface-protection mat. In September 2002, the USPTO approved plaintiff's amended patent.

After the USPTO approved the amended patent, plaintiff discovered that a company called St. Clair Plastics "was out there making and selling my invention without my permission . . . ." Plaintiff brought this concern to the attention of both Rinaldo and Golden Eagle's business litigation firm, Maroko & Landau, P.C. Around the same time, plaintiff's relationship with Waterman deteriorated, and Golden Eagle sought bankruptcy protection.

On May 12, 2003, at plaintiff's request, Rinaldo filed a "reissue application" to "correct inventorship" by removing Waterman's name from the patent as a coinventor. This act continued Rinaldo's representation of plaintiff regarding the defective patent. At that point, correction of the patent to remove Waterman's name constituted the matter about which Rinaldo represented plaintiff as his patent counsel.

On July 9, 2003, plaintiff sent Rinaldo an e-mail stating:

> Michael Nedelman is a new lawyer being added to assist Maroko and Landau in my defense of the patent and any offensive action I may need to take. Michael is well known and respected in the courts. Michael is taking a lead role in the bankruptcy court regarding the termination of my patent license to Golden Eagle as well as other matters. . . .
>
> Would you please give him a brief call or send him an e-mail regarding the patent[?]

According to her billing records, Rinaldo met with plaintiff on July 28, 2003, regarding "litigation," reviewed documents drafted by an attorney concerning "related litigation," and forwarded "comments regarding the same to attorney."

On September 5, 2003, Nedelman wrote to Rinaldo and requested more information about the patent. His letter read: "I need some guidance from you in connection with the anticipated institution of suit against potential infringers upon the patent held by Rickie Wright. Since I have no patent experience, I read the patent as approved by the Patent Office." (Emphasis in original.) Rinaldo e-mailed plaintiff on September 17, 2003, and advised that "we should add a few new claims . . . ." The email continued: "[P]lease let me know how you wish to proceed. I will be out of the office until Monday, but I can begin working on the new claims first thing Monday morning."

Plaintiff, Nedelman, and Rinaldo met on September 23, 2003. On October 14, 2003, Nedelman spoke with another patent attorney, Arnold Weintraub, regarding correction of the inventorship issue. Three days later, Nedelman wrote to Rinaldo to express concern about the progress of the efforts to remove Waterman's name from the patent. Nedelman also criticized "the efficacy" of Rinaldo's attempts to remove Waterman "as an inventor" and expressed concern about the patent itself:

> You have recently admitted that the claims you prepared failed to adequately describe and do not encompass the actual product designed by Rickie

> Wright, and as being manufactured and sold. The failure to advance the correct claims, coupled with your earlier misrepresentations to Rickie Wright that the product was protected, has caused Mr. Wright to suffer significant damages including, but not limited to, lost profits/royalties, the legal fees and expenses paid to your firm, and the costs anticipated to be incurred in rectifying your errors and omissions.
>
> The situation must be rectified, and your errors and omissions corrected to the fullest extent possible. Mr. Wright must be compensated for the damages he has suffered and, if your errors and omissions cannot be corrected, for the damages he will continue to suffer. Please immediately advise me of the course of action you intend to take.

When she received this letter, Rinaldo could have communicated to plaintiff and Nedelman her intent to withdraw as plaintiff's counsel in the patent matter. Alternatively, plaintiff could have fired Rinaldo and instructed Weintraub to file a power of attorney with the USPTO. Instead, Rinaldo responded to Nedelman on October 29, 2003, asserting that "the removal of Wade Waterman as an inventor is being handled properly and in accordance with USPTO practices." Rinaldo concluded:

> Finally, and most importantly, please be aware that the written opinions you expressed in your letter of October 17, 2003, could be grossly prejudicial to Mr. Wright's position. *In the future, Mr. Wright's interests are best served by telephoning our office to seek clarification of any issues that may be confusing to either you or Mr. Wright.* [Emphasis supplied.]

Rinaldo wrote the following to plaintiff on the same day:

> I have responded to Mr. Nedelman's letter of October 17, 2003. Please be aware that the written opinions expressed by Mr. Nedelman in his letter could be grossly prejudicial to your position. *In the future, your interests are best served by telephoning our office to seek clarification of any issues that may be confusing to either you or Mr. Nedelman.* [Emphasis supplied.]

Rinaldo met with Nedelman, plaintiff, and Weintraub on November 7, 2003, and prepared the following "Memorandum of Understanding" summarizing their discussion:

> At a meeting held Friday, November 7, 2003, it was agreed among all parties present that Nedelman and/or Weintraub will draft, file, serve and prosecute to finality a civil action lawsuit on behalf of Rickie Wright against Wade Waterman.
>
> It was further agreed among all parties present that Rinaldo will draft and file an amendment consistent with the claims presented at the meeting by Weintraub.

Later that month, plaintiff e-mailed Rinaldo to "check in and make sure you, Michael, and Arne [Weintraub] are working toward a correction of the problems we discussed regarding the patent

and it's [sic] claims." The e-mail concluded, "Please let me know if you have any questions or if I can help in any way." On November 26, 2003, Rinaldo replied: "The week after we met I sent the correction to Arnie [Weintraub]. I am waiting for him to tell me to file the amendment." On December 3, 2003, Rinaldo e-mailed the proposed amendment to Weintraub, along with a USPTO form entitled "Reissue Application Declaration By The Inventor," which listed Rinaldo and her law firm as plaintiff's counsel after the language "As a named inventor, I hereby appoint the following attorney(s) and/or agents to prosecute this . . . ."

On December 18, 2003, plaintiff signed a document revoking Rinaldo's USPTO power of attorney and executed the affidavit discussed by the majority, which referred to Rinaldo as his "previous counsel." Despite signing these documents, plaintiff deliberately refrained from instructing Weintraub to file the documents or discharging Rinaldo as his patent counsel. On January 9, 2004, Rinaldo signed an affidavit averring that Waterman had "made no contribution to the invention of the surface protection mat" and had been "inadvertently and erroneously identified as a co-inventor" in the patent application. On January 21, 2004, plaintiff sued Waterman in federal court, seeking a declaration that Waterman had no legally cognizable interest in the surface-protection-mat patent.

In February 2004, Weintraub mailed to the USPTO the preliminary patent amendment prepared by Rinaldo, as well as the signed revocation of her power of attorney. The parties agree that, for unknown reasons, the USPTO never acknowledged receiving these documents and did not act on them. According to Weintraub, a patent examiner eventually told him that the February 2004 filings had "fallen into a black hole . . . ." Weintraub resubmitted the materials in September 2005, and the USPTO finally processed them on October 20, 2005.

Meanwhile, however, the amendment submitted by Rinaldo in May 2003 remained pending in the USPTO. On October 17, 2005, the USPTO announced its decision regarding the patent amendment by sending Rinaldo, the attorney of record, an "Office communication concerning this application or proceeding," which informed Rinaldo that the USPTO had rejected "Claim(s) 1-8" of the May 12, 2003, patent reissue application. A clerk at Rinaldo's office wrote on the USPTO transmission document: "Response 11-17-05."

Rinaldo admitted at her deposition that she had never sent plaintiff a communication reflecting her intent to withdraw as his patent counsel. She additionally conceded that plaintiff had never advised her that he had "fired" her; she merely assumed that he had done so because of the "tone" of their November 7, 2003, meeting with Nedelman and Weintraub. Nor did Rinaldo make any effort to withdraw as plaintiff's patent counsel, pursuant to the clear provision of the patent rules providing: A registered patent attorney or patent agent who has been given a power of attorney pursuant to [37 CFR 1.32(b)] may withdraw as attorney or agent of record *upon application to and approval by the Director*." 37 CFR §1.36(b) (emphasis supplied). This rule bears a substantial similarity to MCR 2.117(C)(2), which provides that "[a]n attorney who has entered an appearance may withdraw from the action or be substituted for only on order of the court."

II. Application of the Law

The majority's decision to affirm the trial court's grant of summary disposition is premised on its determination that "the attorney-client relationship was, in fact and law, terminated as of December 18, 2003," the date that plaintiff signed the revocation of the power of attorney. Ante at ___. According to the majority, plaintiff "ended the attorney-client relationship with Rinaldo no later than December 18, 2003, although he did so in a somewhat unorthodox fashion." *Ante* at ___.

But the determination of when a legal-malpractice action accrues for purposes of the statute of limitations does not depend on a subjective interpretation of when plaintiff "ended" or "terminated" the attorney-client relationship. Rather, MCL 600.5838(1) requires that an analysis of accrual focus on the date that the defendant attorney discontinued serving the plaintiff in a professional capacity, "regardless of the time the plaintiff" had knowledge of the claim. In *Gebhardt v O'Rourke*, 444 Mich 535; 510 NW2d 900 (1994), our Supreme Court examined the application of MCL 600.5838 in a legal-malpractice case. The Supreme Court observed that the "statute is unambiguous" and held that a "client has up to two years from the time his attorney stops representing him regarding the matter in question to bring a malpractice suit." *Id*. at 541, 544. Rinaldo did not and could not stop representing plaintiff until (1) he fired her, (2) the USPTD received and accepted plaintiff's request to revoke Rinaldo's power of attorney, or (3) she communicated to plaintiff that she had terminated their relationship. None of these events occurred until October 2005.

Citing *Kloian v Schwartz*, 272 Mich App 232, 237; 725 NW2d 671 (2006), the majority holds that plaintiff's "retention of an alternate attorney effectively terminate[d] the attorney-client relationship." *Ante* at ___. In my view, this is a patently incorrect conclusion because the alternate attorney plaintiff retained, Weintraub, worked *with* Rinaldo and not in her stead. Rinaldo, Weintraub, and plaintiff met together on November 7, 2003, and Rinaldo subsequently prepared a "Memorandum of Understanding" regarding that meeting that reflected *her* intent and designated assignment within plaintiff's legal team to "draft and file an amendment consistent with the claims presented at the meeting by Weintraub." Despite plaintiff's retention of Weintraub, Rinaldo clearly continued to serve as plaintiff's official patent counsel.

Furthermore, the statement from *Kloian* on which the majority relies in my view qualifies as dictum, unnecessary to that decision and simply incorrect under the plain language of MCL 600.5838. In *Kloian*, the defendant attorneys informed the plaintiff in writing that the trial court had dismissed the plaintiff's case. In the same writing, the defendant attorneys additionally informed the plaintiff that they would not prosecute an appeal on the plaintiff's behalf. *Id*. at 236. This Court held that

> in the absence of an attorney's dismissal by the court or the client, and in the event that an attorney sends notice of withdrawal as his or her final act of professional service, a legal malpractice claim with respect to a particular matter that has been finally dismissed by order of the trial court accrues at the time affirmative notification of withdrawal is sent. [*Id.* at 238.]

Unlike the defendant attorneys in *Kloian*, Rinaldo did not send plaintiff a "notice of withdrawal" as his patent counsel. The October 2005 transmission to Rinaldo of plaintiff's revocation of her power of attorney constituted the only "affirmative notification" that Rinaldo no longer represented plaintiff before the USPTO. In my view, *Kloian* supports a conclusion that plaintiff's legal-malpractice claim did not accrue until October 2005, when Rinaldo received the affirmative notification that plaintiff had terminated their attorney-client relationship.

Elsewhere in *Kloian*, this Court observed that "an attorney's representation of a client generally continues until the attorney is relieved of that obligation by the client or the court." *Id.* at 237. This Court followed that sentence with a statement that now serves as the linchpin of the majority opinion: "'Retention of an alternate attorney effectively terminates the attorney-client relationship.'" *Id.*, quoting *Mitchell v Dougherty*, 249 Mich App 668, 683; 644 NW2d 391 (2002). The *Kloian* opinion identified *Maddox v Burlingame*, 205 Mich App 446, 450; 517 NW2d 816 (1994), as the original source of the language "retention of an alternate attorney.".

In *Maddox*, however, this Court noted that the retention of alternate counsel did *not* terminate the attorney-client relationship or alter the date on which the plaintiff's legal-malpractice claim accrued:

> Although plaintiffs already had consulted alternative counsel in Florida in August 1988, we do not believe that this necessarily terminated the attorney-client relationship between the instant parties because defendant earlier had directed plaintiffs to consult with Florida counsel in order to protect fully plaintiffs' interests under Florida law. In other words, plaintiffs' Florida counsel was not consulted in place of, but in addition to, defendant. [*Id.* at 451.]

In my view, the relationship between Weintraub, Rinaldo, and plaintiff was directly analogous to that of the lawyers and parties involved in *Maddox*. Weintraub and plaintiff deliberately continued Rinaldo as plaintiff's official patent counsel and relied on her efforts in this role to correct the patent. They planned to delay her discharge until Weintraub officially substituted as plaintiff's counsel.

The majority clearly believes that plaintiff, Nedelman, and Weintraub conducted themselves in an offensive manner. That may be an accurate perception. Regardless of the negative and derogatory behind-the-scenes discussions between plaintiff, Nedelman, and Weintraub regarding Rinaldo, plaintiff intended that she remain his official patent counsel until Weintraub officially superseded her. Further, the character of a client's conduct is not an element of the definition of accrual under MCL 600.5838.

In my view, the majority has essentially rewritten the text of that statute in order to punish plaintiff for his duplicity regarding Rinaldo. From a pure policy perspective, it may be appropriate to penalize clients who behave as plaintiff did and to prohibit "strategic concealment" of an intent to discharge counsel. But the statute simply cannot be read to provide that a legal-malpractice claim accrues when a client decides to fire his or her lawyer or discusses with alternate counsel a plan to replace the current lawyer. Rather, the statute clearly and unambiguously provides that a malpractice claim accrues "at the time [the defendant] discontinues serving the plaintiff in a professional . . . capacity as to the matters out of which the

claim for malpractice arose, *regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.*" MCL 600.5838(1) (emphasis supplied). According to the USPTO, Rinaldo continued to represent plaintiff and remained his official patent counsel until October 20, 2005. In the absence of any communications to the contrary, Rinaldo remained responsible for the prosecution of the May 2003 patent reissue application, at least until she learned in October 2005 that plaintiff had revoked her power to act as his patent counsel.

Because plaintiff filed this lawsuit in February 2006, I conclude that it was timely filed and would reverse the trial court's grant of summary disposition.

/s/ Elizabeth L. Gleicher